No. 85-1611

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Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1985

ROGER ARNEBERGH,

Petitioner,

vs.

E. F. HUTTON & COMPANY, INC.,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT
OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S REPLY BRIEF

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I

RESPONDENT HAS MISSTATED THE RECORD

The decisions by the District Court and the Court of Appeals below have presented this Court with important constitutional questions concerning the meaning of the Seventh Amendment. We

believe that this Court should decide whether to resolve those questions on the basis of a correct statement of the record below. Consequently, we submit the following corrections to the misstatement of that record by respondent:

1- Judgment was entered in the District Court against Arnebergh in the amount of $336,614.11 (Petition, A-26(1)), not $168,307.00 as stated in respondent's brief at page 2.

2- Arnebergh and Hutton did not "agree" to a "stop loss" sale order on April 8, 1980, as stated on page 7 of respondent's brief. In fact, as the record below reflects, respondent fraudulently obtained additional security from petitioner by way of a deed of trust on petitioner's real estate on that date. (Petition, A-55 Issue 23 of special verdict.)

3- The parties did not stipulate that Arnebergh owed E.F. Hutton an account balance of $336,614 as stated on page 9 of respondent's brief. The parties' stipulation, as stated by the District Judge to the jury before the commencement of opening arguments, was as follows:

"As I think we discussed earlier, the lawsuit involves really two sets of claims. E. F. Hutton has a claim against Roger Arnebergh, and that is in the amount of $336,614.11. And Roger Arnebergh also has several claims and defenses against E. F. Hutton and others. It's been agreed between counsel that if Roger Arnebergh fails to prevail on any of his claims or defenses, E. F. Hutton is to recover a judgment against him in the amount of $336,614.11." (RT 50)

4- On page 10 of its brief respondent states that the jury found E. F. Hutton had committed no fraud. As noted, that is not correct. The jury expressly found that respondent procured a trust deed to petitioner's property by fraud. (Petition, A-55 Issue 23 of special verdict) Additionally, the jury found respondent

guilty of conversion, a fact not mentioned by respondent in its recitation of the jury's findings. (Petition, A-48 Issue 14)

5- Contrary to respondent's statement on page 13 of its brief, both counsel did not agree to the in camera proceeding. Not only did petitioner's counsel initially object to the examination of former jurors by a lengthy memorandum filed in opposition to such proceeding (CR 83), we continued to oppose any post-trial examination of the former jurors for any reason whatsoever. The only thing we agreed to was that if the District Court proceeded with its plan to examine the former jurors, such post-trial examination should be conducted in camera. Thus, the stipulation for in camera examination begins with the following statement:

"Subject to and without waiving in any way the continuing objection of Roger Arnebergh to the receipt of juror testimony..." (CR 85).

II

RESPONDENT'S ARGUMENTS ARE CONTRARY TO THE LAW AND THE FACTS

A. The Verdicts Were Impeached As A Result Of The Challenged Post-Trial Jury Examination.

Among the various dictionary definitions of the word "impeach" are the following: "to cast doubt on"; and "to challenge, call in question, attack". (See Webster's New Collegiate Dictionary, 1981 Edition, and The Shorter Oxford English Dictionary, 1933 Edition).

In this case, respondent cast doubt upon and called into question the plain language of the jury's verdicts with respect to the award of compensatory damages. Then, after recalling the

former jurors and examining them, the District Court doubled the damages the jury had awarded respondent. If that isn't "impeachment" of the verdict rendered we don't know what impeachment consists of.

Moreover, contrary to respondent's assertions we did not claim that the "jury re-examined its factual determinations." We claimed that the District Court reexamined the jury's factual determinations in violation of the second part of the Seventh Amendment. That is precisely what the District Court did in this case.

Finally, once a jury verdict has been rendered, and the jury discharged, a federal District Court may not properly take evidence, by testimony or affidavit, to attempt to change the verdict, whether such change be deemed impeachment or

correction. Hyde v. United States, 225 U.S.347, 388 (1912), McDonald v. Pless, 237 U.S. 264, 266-268 (1915); and Dunn v. United States, 284 U.S.390, 393-394 (1932)

If a jury verdict is unclear, inconsistent, or otherwise unacceptable at the time it is rendered, the verdict should be clarified before it is accepted and the jury discharged. That is why juries are polled and federal courts are given the express authority to return the matter to the jury for further consideration (F.R.C.P. Rule 49(b))

Once verdicts are accepted and the jury discharged, however, if a District Court finds that the verdicts rendered are so inconsistent or ambiguous that it cannot fairly render an appropriate judgment upon the verdicts, the District Court has only one proper remedy, to

grant a new trial. (9 Wright & Miller, Federal Practice and Procedure, §2510, pp 517-518, fn.17 and cases cited therein) The District Court cannot, as it has done here, arbitrarily enter a judgment upon an accepted verdict which increases the amount of the damages awarded. (Dimick v. Schiedt, 293, U.S. 474, 486-487 [1935])

If a District Court could do such a thing, a District Judge could always substitute himself for the jury, and render whatever judgment upon a verdict he considers was intended by the jury. Such a procedure renders juries in civil cases useless, and jury verdicts only instruments for interpretation by District Judges in formulating whatever judgment they arbitrarily decide to render in a case.

If the Seventh Amendment means anything, it surely must prohibit such conduct.

B. The Legal Propositions And Authorities Relied On By Respondent Are Inapposite.

Respondent argues that jurors are competent witnesses for the purpose of showing that the verdict returned to the court was not the agreement actually reached in the jury room and not the verdict actually agreed upon.

Such a statement is only half right, and doesn't apply at all to this case. Where it applies, the jury has not been discharged, but is being asked to advise the court whether there is an agreed upon verdict in fact, and what it is.

Thus, for example, in Continental Baking Co. v. Old Homestead Bread Co., 476 Fed.2d 97, 109-110 (10th Circ. 1973) the ambiguity in the verdict was

discovered when the jury was polled and before the jury was discharged. The court then gave the jury a specific interrogatory so that the jury could correct its verdict before the case was concluded.

While the court in Young v. United States, 163 Fed.2d 187, 189 (10th Circ. 1947) did indicate that jurors are competent witnesses for the purpose of showing that the substance of the verdict returned into court was not the verdict on which agreement was actually reached in the jury room, that statement was dicta, as the court actually held that the "testimony of the members of the jury would not be admissible in support of the motions filed in the district court to set aside the verdicts and grant a new trial."

As previously noted, Fox v. United States, 417 Fed.2d 84 (5th Circ. 1969) and United States v. Love, 597 Fed.2d 81 (6th Circ. 1979) are clearly distinguishable from the case at hand. In Love the jury was allowed to correct its own admitted mistake before the verdict was accepted and the jury discharged (just as in Continental Baking). In Fox it was discovered that no unanimous verdict (as required) was ever reached.

C. That Portion Of The Judgment Appealed From (Awarding Damages To Respondent) Does Not Conform To The Jury Verdicts Even As Interpreted By Respondent.

On page 27 of its brief, and elsewhere, respondent admits that "Arnebergh was to pay $168,307 to E. F. Hutton and E. F. Hutton was to absorb the other $168,307 loss." That is correct; and that is what the jury did. However, respondent goes on to argue that "the jurors did not intend the verdict to mean

the amounts cancelled each other out, thereby resulting in Arnebergh owing E.F. Hutton zero."

That last statement is misleading.

As clearly evidenced by the special verdict in favor of petitioner, not only did the jury find respondent liable to petitioner because of respondent's breach of express contract, breach of the implied covenant of good faith and fair dealing, negligence and conversion; the jury also expressly found that, in each such instance, respondent had damaged petitioner by its wrongful conduct. (See Petition, A-38-39 Issue 2; A-41 Issue 4; A-42-43 Issue 6; and A-50, Issue 15)

Consequently, the District Court could not have refused to award any compensatory damages to Arnebergh.

Because of the jury's express findings of both liability and damage,

and because Arnebergh had proven damages of at least $330,912, without interest, the District Court simply had to award petitioner compensatory damages; and it did so. Whether it awarded petitioner the proper amount of compensatory damages is no longer relevant because neither party raised that issue in the Court of Appeals.

Respondent further confuses the issue by arguing, on page 28 of its brief, that "the jurors themselves intended the effect of their verdict to be a 50/50 split of the total damages."

That argument ignores the fact that Arnebergh proved that he had been damaged in the amount of at least $330,912, and (as noted) the jury had expressly found that he had been damaged by each of Hutton's wrongful acts.

What respondent is doing, therefore, is to look at only one side of the litigation, Hutton's case against Arnebergh; and to ignore Arnebergh's case against Hutton.

D. In The Context Of The Facts Of This Case, The Post-Trial Contact With The Former Jurors By One Of Respondent's Attorneys Was Prejudicial.

We agree with respondent that attorneys for parties can, and frequently do, contact the jurors after a case has been decided, particularly as the jurors are filing out of the courtroom to find out what went right or wrong, as the case may be. However, we have an entirely different situation here.

Mr. Simpson spoke with some of the former jurors after they had been discharged and were filing out of the courtroom believing they would never have to be involved with this case again. Apparently he learned nothing of any use

to him at that time, at least he has not claimed that the former jurors immediately expressed doubts as to what they intended by their verdicts.

Later on, however, Mr. Simpson started to contact the former jurors to see if they would agree with him as to his interpretation of the verdicts. Not only did Mr. Simpson plant seeds of doubt in the minds of the jurors he contacted, he had an opportunity to argue his interpretation of what they had done or (in his opinion) should have done. At least one of the former jurors resented Mr. Simpson's contacts, called the court, and caused the court to issue an order to show cause. (CR 80)

We respectfully submit that in the context of the question presented to the former jurors at the post-trial jury examination (i.e. what did they intend by

their verdicts?), the contacts with the former jurors by respondent's attorney was improper and prejudicial to petitioner. See concurring opinion of Justice Mosk in Ballard v. Uribe, 41 Cal. 3d 564, 575-578, ___ Pac. 2d ___ [1986] concerning the disruptive effect on the judicial system of losing parties seeking to impeach jury verdicts.

When that conduct is coupled with the District Court's focusing the former jurors' attention on the case of Hutton v. Arnebergh to the exclusion of Arnebergh's case against Hutton, and the District Court's erroneous statement to the former jurors that counsel for both parties agreed that the verdicts were unclear, the unfairness of the post-trial jury examination becomes overwhelming.

CONCLUSION

Unless Certiorari is granted the law, at least in the Ninth Circuit, will be as established by the published opinion of the Court of Appeals. That opinion has received considerable media coverage, including a front page article in the Los Angeles Daily Journal, a legal publication read by judges and attorneys in Southern California. The new law, as so established, will be that:

1. A trial court may recall former jurors 5 weeks after their verdict was accepted and the jury discharged, to have them explain what they intended by a verdict for a specified dollar amount.

2. A trial court may arbitrarily enter judgment for double the amount of a jury verdict.

3. A jury verdict for a specified dollar amount is "ambiguous" unless the verdict also sets forth how the dollars awarded shall be applied.

We believe that is contrary to the law as this Court has stated it, and should be rejected by this Court for the benefit of courts and litigants throughout the federal system.

Dated: May 9, 1986

Respectfully Submitted,

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